MK v LKK & 3 others (Environment and Land Appeal E009 of 2023) [2025] KEELC 5424 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5424 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND APPEAL E009 OF 2023

A KANIARU, J

JULY 17, 2025

BETWEEN

MK ..... APPELLANT

AND

LKK ..... 1ST RESPONDENT

MMK ..... 2ND RESPONDENT

IK ..... 3RD RESPONDENT

MN ..... 4TH RESPONDENT

JUDGMENT

1. This appeal arose from the judgment of the lower court, Kitui, (Hon. M. Kasera, Senior Principal Magistrate) delivered on 31/3/2023. It is based on five (5) grounds, which I set out hereunder ipsissma verba:

    1. That the learned Senior Principal Magistrate erred and misdirected herself both in law and facts by holding that the title number Nzambani/Maluma/xxx constituted the matrimonial property between the 1st respondent and the 4th respondent contrary to clear evidence that was tendered before her.

    2. That the Learned Senior Principal Magistrate erred and misdirected herself on the law and the facts when she failed to find that the 1st and 4th respondents having separated in 1979, and neither of them having lived on land title number Nzambani/Maluma/xxx could not constitute matrimonial property requiring spousal consent before disposal.

    3. That the Learned Senior Principal Magistrate erred and misdirected herself on the law and the facts when she tended to blame the appellant of (sic) not having done sufficient due diligence

before acquiring land title number Nzambani/Maluma/xxx and yet there was a court ruling allowing the sale to proceed.

4. That the Learned Senior Principal Magistrate erred and misdirected herself on the law and the facts when she granted to the 1st respondent a remedy that was not founded on the pleadings and consequently not in accordance with the law.

5. That the Learned Senior Principal Magistrate erred and misdirected herself on the law and the facts when she failed to find that the appellant was a bonafide purchaser of land number Nzambani/Maluma/xxx and therefore entitled to the whole title.

2. The appellant expects a favourable finding from this court and she therefore wishes that the judgement of the lower court be set aside and in lieu thereof be substituted with an order dismissing the 1st respondent's case against the appellant and allowing the appellants case in the lower court as prayed with costs. She also wants costs of this appeal.

3. Land parcel No. Nzambani/Maluma/xxx ("disputed land" hereafter) was initially registered in the name of 4th respondent – MN – who was allegedly a husband to 1st respondent – LKK – and father to 2nd and 3rd respondents – MMK and IK. The 4th respondent decided to sell the disputed land to the appellant – Mariana Kathini – and the 1st, 2nd and 3rd respondents got to learn of it. They were not pleased at all. The 1st respondent sued the 4th respondent in the lower court here in Kitui *vide* suit No. PMCC No. 204 of 2014 seeking inter alia, an order of permanent injunction against the 4th respondent and/or others acting through him or at his behest. The 4th respondent at first opposed the suit via a defence filed on 1/9/2014 in which he pleaded, *inter alia*, that he was the absolute owner of the disputed land and that he had no family members to be involved or consulted in any dealings over the disputed land. He asked that the 1st respondent's suit be dismissed.

4. It is clear that the 1st Respondent's suit in the lower court was amended vide a plaint filed on 8/5/2018. The amendment brought on board a new party – MK – who is now the appellant here. The amended plaint also captured more elaborately the antecedents surrounding the matter. It emerged that the 1st and 4th respondents were husband and wife, having become such in 1967. In the course of the marriage, they were blessed with children and they also acquired some pieces of land, the disputed land included. The 4th Respondent was accused of having secretly sold the disputed land to the appellant. It is clear that the entire contestation before court revolved around that sale. The 4th Respondent and the Appellant believed that the sale was sound in law while the 1st Respondent believed it was not as her interest in the property was not taken into account.

5. In addition to the order of permanent injunction sought in the initial plaint, the amended plaint shows the 1st respondent seeking a declaration that she has an overriding interest in the disputed land and also that the sale that had taken place was null and void.

6. Of course, those sued – that is 4th Respondent and the Appellant – denied the 1st Respondent's claim.

7. Much later, the Appellant herself filed her own suit vide a plaint dated 20/8/2018. She sued the 1st, 2nd and 3rd Respondents, who are mother and sons respectively, claiming, inter alia, that they had trespassed into the disputed land, at the time registered in her name, and they were allegedly cutting down trees and burning charcoal. The Appellant wanted the three respondents evicted. She was also claiming damages and mesne profits. The three respondents denied the appellant's claim via a defence filed on 1/10/2018. The defence came with a counter-claim, which essentially aligned well with the 1st respondent's suit while at the same time introducing a new perspective namely: acquisition of prescriptive rights by the three respondents.

8. Basically, the layout of suits in the lower court in terms of pleadings is as stated heretofore. And then the hearing started. The 1st respondent was the first to testify and she did so as PW1: She said, inter alia, that the 4th respondent was her husband. She also adopted her written statement as her evidence. That statement is dated 9/4/2021 and in it, she says, inter alia, that she got married to 4th respondent in 1966 or thereabouts. They sired children and the 4th respondent established a home for her on the disputed land in 1967. She and her children, she continued to say, lived and still live on the disputed land. She talked of having warned the appellant against buying the disputed land but she ignored the warning and went ahead to transact with the 4th respondent. To the 1st respondent, the appellant is the author of her (appellant's) own problems. This witness was cross-examined and the record shows her saying that she got married in 1967, lived in Maluma, then in Mombasa; separated from her husband in 1979, bought the disputed land from one Mutia Miwa; that 4th respondent got registered as owner because he was her husband, that she knew the appellant as the one who bought the disputed land, and that the disputed land is her own land.

9. MN, the one said to be PW1's spouse, testified as DW1. He adopted his written statement as his evidence and in it, he stated, *inter alia*, that he never married PW1. She came to him with three children when he was in Mombasa. They parted ways in 1972 and she went back to her lawful husband. She is said to have left with her children. According to this witness, none of the children of PW1 bears his name. To him too, neither PW1 nor her children have any right over his properties. PW1 was merely his former concubine, he said. As regards the disputed land, he said he bought it while he was working in Mombasa.

10. DW1 was cross-examined. In answer to some of the questions posed, he said he educated PW1 and her younger siblings; that PW1 took her identity card in his name in 1979; and that she then changed her name and the names of the children by removing his name. He also talked of having lived with PW1 on the disputed land in 1972. There are some of the children, he said, who are deceased and were buried on the disputed land. During re-examination, he denied having re-united with PW1 after 1979. He also talked of having called PW1 and the children sometimes in August 2002. He urged them to include his name in their identities but they refused. He confirmed having sold the disputed land to the appellant.

11. The appellant on her part gave evidence as DW4. She adopted her written statement dated 25.1.2022 as evidence. She stated in her statement that she bought the disputed land from DW1 and she did so after conducting due diligence. She further said that at the time she bought it, there were no structures erected on it. But there was an old farm left to lie farrow. After buying the land, DW4 went back to her place of work at Maasai Mara, Narok, and she came back after five months only to find that the 2nd and 3rd respondents had entered the land apparently with the blessings of 1st respondent. DW4 reported the matter to the area local administration and 2nd and 3rd respondents allegedly agreed to move out of the disputed land after harvesting the crops they had planted.

12. But the 2nd and 3rd respondents never moved out of the disputed land. They even put up structures on it. The 1st respondent was said to reside elsewhere but she would occasionally visit the 2nd and 3rd respondents on the disputed land. This turn of events seems to have made the appellant enquire a few things from the 4th respondent. The 4th respondent is said to have told her that he was never married to 1st respondent. The 1st respondent was only his concubine from 1966 to 1972. The 1st respondent is said to have gone back to her former husband, who was the father of her children.

13. The appellant was subjected to cross-examination. In response to some questions, she is shown saying that 1st respondent was not party to sale agreement for the disputed land; that she didn't know who the 4th respondent's wife was; that at first it is her mother and uncle who viewed the disputed land before

sale and that she also did so later; that she saw a homestead on the land; that the 4th respondent (seller) said his family was living there but he had moved it to the ancestral land; that she didn't see any graves on the disputed land; that the homestead she was deserted; and that the disputed land was her own and she had a clean title.

14. I have set out in a somewhat lengthy manner the evidence of the appellant, 1st respondent, and 4th respondent because they are the main contestants in the matter. It is worth pointing out that they called some witnesses who backed their respective positions in the suit.

15. It is in light of the pleadings, evidence, and submissions filed and tendered in the lower court that the judgement dated 31/3/2023 was delivered. It is clear that in the judgement, nobody had his or her way completely. The appellant got half of the disputed land. She wanted all of it. The 1st respondent got the other half. She also wanted the whole land.

16. The appellant felt sufficiently aggrieved and hence this appeal.

17. The appeal before the court now was canvassed by way of written submissions. It is worth mentioning that during the pendency of the appeal in court, the 4th respondent – MN – passed on and subsequently, the appeal against him was marked withdrawon on 3/10/2024.

18. The appellant's submissions are dated 10/6/2024. There is an overview of the entire case first before the appellant embarked on a two–pronged analytical thrust which placed the two issues of innocent purchase without notice of defect of title and the alleged fact of the disputed land being matrimonial property at the center of the submissions. On the issue of being an innocent or bonafide purchaser, the case of *Weston Gitonga & 10 others v Peter Rugu Gikanga & Another* [2017] eKLR was cited. In the case, the Ugandan case of *Kattende v Havidar & Company Ltd* [2008] 2 EA 173 was cited with approval to demonstrate the threshold that a person alleging to be an innocent purchaser should meet. *Katende's case* (ante) described a bonafide purchaser as one who purposely wants to buy property offered for sale and intends to do so in a clean and blameless manner. For a person to rely on this legal concept in a court of law, he must prove that he has a certificate of title, that he had no knowledge of fraud, that he paid valuable consideration, that the seller had an apparent valid title, that he had not notice of fraud, and that he was not party to any fraud.

19. The appellant was said to be an innocent purchaser because she has a certificate of title, purchased the disputed land in good faith, that she had no knowledge of the alleged interest of 1st to 3rd respondents, purchased the disputed land for valuable consideration, had no knowledge or notice of fraud and was not party to any fraud.

20. This is said to be in contrast with the 1st respondent's claim which the appellant submitted to be apparently based on the fact of marriage to 4th respondent, a possible reference to overriding interest. It is also said to be based on prescriptive rights and then on purchase. These various ways of staking ownership to the disputed land by 1st respondent are said to make her claim dubious and inconsistent.

21. The appellant also contested that the disputed land is matrimonial property. She pointed out that the 4th and 1st respondent separated in 1979 and although the 1st respondent claimed to have been living on the disputed land, the 4th respondent denied this allegation. It was pointed out that he appellant filed her suit seeking to evict the 1st respondent's two Sons who had trespassed into it when she started fencing it. The temporary occupation of the disputed land after they trespassed into it does not make the disputed land matrimonial property.

22. Further, the appellant submitted that for property to qualify as matrimonial home, there has to be a marriage. The 1st and 4th respondents were said to have been cohabiting. According to the appellant,

cohabitation is nothing more than friendship. It was submitted that it was upon the 1st respondent to prove marriage and the case of *Christine Nekesa Wafula v Janerose Sakin Nduguyu* [2021] eKLR was cited and quoted to make the point that the burden of proving marriage was on the 1st respondent.

23. The respondent's submissions are dated 19/11/2024. According to the 1st respondent, the issues to be addressed include whether the disputed land is matrimonial property; whether the appellant should have sought spousal consent from the 1st respondent; whether the appellant acquired a good title; whether the lower court judgement should be set aside; and/or whether the appeal is merited. The 1st respondent also wishes to get the cost of the appeal.

24. According to the 1st respondent, the disputed land is matrimonial property as it was acquired during the subsistence of marriage between her and 4th respondent. It is such property because it falls within the definition of matrimonial property under Sections 6 (1) (c), and 14 of the *Matrimonial Property Act*. Section 6 (1), (c), describes such property as one of immovable or moveable nature jointly owned and acquired during subsistence of marriage. Section 14 addresses a situation where such property is registered in the name of one spouse. In such a situation, a rebuttable presumption arises that the property is held in trust for the other spouse. The case of *Njoroge v Ngari* [1985] KLR 480 was cited to illustrate the proposition that where matrimonial property is being held in the name of one person but the other person makes a contribution towards its acquisition, then each spouse has a proprietary interest in that property. The 1st respondent in the matter at hand was said to have developed the disputed land with her children while the 4th respondent was working in Mombasa.

25. It was further submitted that as the disputed land was a matrimonial property, the appellant ought to have sought consent first from the 1st respondent. In this regard, reliance was placed on Section 12 of the *Matrimonial Act* which mandatorily requires that matrimonial property should not be alienated during subsistence of a monogamous marriage without the consent of both spouses. As the appellant acquired matrimonial property without spousal consent, she was said not to have acquired a good title. The transaction relating to her acquisition of the property was said to be null and void. To drive the point home, the cases of *Mugo Muiru Investments Limited v EWB & 2 others* [2017] eKLR and *Kadzo Mkutano v Mukutano Mwambonje Kadosho and 2 others* [2016] eKLR were cited and quoted. The same cases were invoked to emphasize that the 1st respondent enjoyed an overriding interest over the disputed land under Section 28 of the *Land Registration Act*, 2012.

26. The lower court judgment should not be set aside, the 1st respondent submitted. While making its decision, the lower court was said to have been guided by Section 93 (2) of the *Land Registration Act*, 2012. The disputed land was said to be matrimonial property. The 4th respondent was said to have testified that he set up a home there for his family.

27. The 1st respondent also asked for costs. She pointed out that the lower court awarded the appellant a portion of land but she wanted more and therefore filed this appeal. As the appeal is one allegedly without merits, the 1st respondent submitted that the appellant should be made to pay costs.

28. I have considered the appeal as filed, rival submissions, and the lower court record. This is a first appeal and the manner of handling it was succinctly stated in the case of *Selle v Associated Motor Boat Company* [1968] EA 123 where Sir Clement De Lestang V.P stated as follows:

> "... this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has failed on some point to take account of particular circumstances or probabilities materially to estimate the

evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

29. I have already stated the issues that the 1st respondent would wish addressed. The appellant on her part has the success or failure of the appeal hinged on whether the disputed land is matrimonial property and whether or not she is an innocent purchaser for value without notice or knowledge of defect of title. I would like to go by these two broad issues delineated by the appellant because their determination will also largely determine the fate of the segmented issues raised by 1st respondent.

30. It is necessary first to consider whether the disputed land is matrimonial property. According to the appellant herself and the 4th respondent who sold the land to her, it is not. The appellant said she conducted due diligence before buying the land. She went to the land office to establish who the owner was and whether it was encumbered. She also visited it. In her written statement which she adopted as her evidence, the appellant is shown saying that she asked the seller about the 1st respondent and the seller told her that the 1st respondent was never formally married to him and that she was only his concubine from 1966 to 1972 while he was staying in Mombasa. She was further told that the two parted ways and the 1st respondent went back to her former husband who was the father to her children.

31. The 4th respondent's witness statement, which was adopted during hearing as his evidence, shows him calling the 1st respondent "my former concubine" and averring that she was never married to him. In the statement, the 4th respondent said that the 1st respondent went to him with three children in 1966 when he was staying in Mombasa. They parted ways in 1972 and she went back to her husband. But his oral evidence in court seem to contradict this position. He is shown saying that he married the 1st respondent and even paid some dowry. They parted ways sometimes in 1979 and have never re-united. He is also shown saying that the 1st respondent removed his name from her identity card, which by inference means that even 1st respondent official identity document at one time had the 4th respondent's name. Some of the children's names also seem to have had the 4th respondent's name as surname. This is deducible from the fact that even the children's names had allegedly been changed by dropping his name.

32. In my considered view, what the 4th respondent told the court is not well aligned with the 4th respondent's alleged status as a concubine. It instead resonates well with her status as a wife. One question that would be difficult for 4th respondent to answer is whether a dowry is customarily paid for a "concubine" or whether its usual to allow such a person to include your name in official identification documents. I take it therefore that the 1st respondent was married to the 4th respondent and both lived happily or at least tolerably, together before the relationship soured so much that they had to part ways. People usually part ways either through divorce or separation. In their case, it was separation. Separation in law does not mean cessation of marriage. What it means rather is that the marriage still subsists although the parties are no longer living together. It appears to me therefore that if the 4th respondent was being less than honest to the appellant. This could be the same kind of behavior shown to the appellants own mother (DW 2 in the lower court) who is shown to have noticed some three structures on the disputed land and upon asking the 4th respondent about them or their occupants, he is said to have responded that they belonged to some family members who had vacated the land because he had expressed to them his intention to sell it. In his evidence in court, the 4th respondent never talked of any member of his family leaving the land because he was selling it.

33. Was the disputed land acquired during marriage? The 1st respondent said she bought the land from one Mutua. The 4th respondent denied this and averred that he is the one who bought the land. There is no suggestion at all that the disputed land was acquired before marriage. And of course one cannot

say that it was acquired after marriage because from a purely legal perspective the marriage between the 1st respondent and 4th respondent only ended when the 4th respondent passed on. It is important to appreciate in this regard that that this end can in no way be construed to mean divorce. It is an end that comes about because it is not possible to talk of an existing marriage between the dead and the living. The answer then is that the disputed land was acquired during the subsistence of marriage between the 1st and 4th respondent.

34. I think it is pertinent now to consider whether the disputed land is matrimonial property. The 1st respondent regards it as her matrimonial home. She also called it matrimonial property. The definition of matrimonial property is to be found in Section 6 of *Matrimonial Property Act*. The Section defines matrimonial property as matrimonial home or homes, household goods and effects in matrimonial home or homes and, finally, any other immovable or movable property jointly owned and acquired during the subsistence of the marriage. Further, under Section 14 of the *Matrimonial Property Act* there are two reputable presumptions that arise concerning property acquired during marriage. The first one is that where property is in the name of one spouse, a rebuttable presumption arises that the property is held in trust for the other spouse. But, and this is the second one, where the property is in the joint names of the spouses, a rebuttable presumption is inferred that their beneficial interests in the property are equal.

35. The 1st respondent also cited Section 12 of the *Matrimonial Property Act* which states that an estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

36. But while *Matrimonial Property Act* was cited extensively, it was not the only statute that the 1st respondent sought to rely on. There was, for instance, Section 28 of *Land Registration Act* which at Subsection (a) recognizes spousal rights over matrimonial property as an overriding interest. Reference was also made to Section 93 (2) of the same Act. The section obligates a person to whom the land is transferred or a lender to whom the land is being offered as security to enquire whether consent has been given by the spouse whose name does not appear in the ownership register.

37. It is clear that the disputed land was acquired during the subsistence of marriage between the 1st respondent and 4th respondent. In his evidence, the 4th respondent admitted to having put up a home there for the dwelling and occupation of the family. The 1st respondent seems to have left the place when her relationship with the 4th respondent soured. The children also seem to have left. But the evidence of the place having been a dwelling place was still there when the appellant bought the land. In the lower court, the appellant's side itself talked of having seen or noticed abandoned or dilapidated structures. It appears clear to me that the disputed land was once a matrimonial home, hence matrimonial property within the definition to be found under Sections 2 and 6 of the *Matrimonial Property Act* or Section 2 of the *Land Act*, 2012. An argument may be raised that it ceased to be so when the occupants left the place. But one would have to reckon with the fact that the marriage between the disputing spouses in the matter was still legally subsisting and they are not shown to have leased or owned another place that they could call a matrimonial home.

38. Further, even if it is accepted that the disputed land was no longer matrimonial home, then it still had the presumed status of a matrimonial property bearing in mind that it was acquired during the marriage of the two spouses. It really does not matter whether it is the 1st respondent or 4th respondent who acquired the disputed land. It would still have the presumed status of a matrimonial property either way.

39. When a given property is presumed to have the status of matrimonial property, the law would require that the person disputing that the property is of a matrimonial kind has the burden of proving so to the satisfaction of the court. In this particular case, the appellant and the 4th respondent had that burden. The material before me show that both parties were aware of this. The 4th respondent did call the 1st respondent a concubine in his pleadings. He didn't want not call her his wife. The appellant on her part said she was an innocent purchaser.

40. It is important to appreciate that the law applicable to these matters is the one that existed at time the matters were filed. The 1st respondent's matter was filed in 2014 while the appellants matter was filed in 2018. The legal position I have taken regarding the applicable law is in line with provisions of Section 23 (3), (b), and (c) of *interpretation and General Provisions Act* (Cap 2) which in the relevant parts states as follows:

> "23 .....
> (1)
> (2) .....
>
> (3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not –
>
> (a) .....
>
> (b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or
>
> (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed.
>
> (d) .....
>
> (e) ....."

41. I make this observation because some of the laws applicable to this matter have since undergone some fundamental amendments. For instance, spousal rights over matrimonial property was an overriding interest in *Land Registration Act* in the year 2014 when the 1st respondent filed her suit. The same Act was amended in the year 2016 (See *Act No. 28 of 2016*, Section 11 (a)) and the entire provision was deleted. Another change in the *Land Registration Act* is to be found in Section 93 which previously required that spousal consent be obtained while dealing in or transacting over matrimonial property. The requirement for consent was removed and such dealings and/or transactions were hence forth to be governed under *Matrimonial Property Act* (see *Act No. 28 of 2016*, Section 31). The position as regards this matter is that the law has to apply as it was at the time of filing the suits that gave rise to this appeal.

42. As we have already found, the 1st respondent was not the 4th respondent's concubine. She was his wife. Calling the 1st respondent a concubine was essentially a subterfuge cleverly deployed in this case and meant to help in evading or avoiding the consequences which would come with the recognition of the 1st respondent as a wife. But the 4th respondent gave himself away when he gave evidence in court. He really accepted that he had married the 1st respondent; had even allowed her to include his name in her identification documents; and even desired that the children would bear his name. He expressed this desire upon discovering that the 1st respondent seemed to have prevailed upon the children not to carry that name. The appellant's submissions themselves clearly point out that the 4th respondent had said that the 1st respondent was his wife. But somewhere in the same submissions, there is a flip which

appears to be a contradiction of sorts. In that flip marriage is under-emphasized and concubinage is trumpeted and embraced.

43. The disputed property was therefore the 1st respondent's matrimonial home. She only left it when it ceased to be homely because her relationship with the 4th respondent had deteriorated. As long as the marriage continued to subsist, the place continued being her matrimonial home.

44. The other consideration to make is whether the appellant is an innocent purchaser for value. She submitted that she is. At the time the 1st respondent filed her suit, Section 93 (3) and (4) of *Land Registration Act* stated as follows regarding a lender, assignee, or transferee transacting over matrimonial property:

> " 93
>
> (3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house -
>
> (a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or
>
> (b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire if the assignor or transferor on whether the spouse or spouses have consented to that assignment.
>
> (4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the enquiries made in accordance with subsection (3) (a) or (3), (b) the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition."

45. The 1st respondent sought to rely on Section 93 (*supra*) in her submissions and she seemed to think that a transaction of the kind envisaged by that section is null and void if the consent of a spouse is not obtained. With respect, such transaction is not null and void. It is merely voidable at the option of the spouse whose interest is disregarded. Where such a spouse does not exercise or invoke that option, the transaction is perfectly legal.

46. Section 93 (4) of the Act removes protection form a transferee, assignee or lender who is misled or deceived by the person he is transacting with. The person whose consent was not sought or obtained is given the upper hand in case of a dispute.

47. The appellant submitted at length on the issue of being an innocent purchaser. She started by spelling out the definition of an innocent purchaser as captured in *Black's Law Dictionary*, 10th Edition, which is to the effect that such purchaser is someone who buys something for value without notice of another's claims to it and also without notice, actual or constructive, of the defect in title arising from claims, equities, or infirmities associated with the title. Such a purchaser is required to have paid valuable consideration in good faith. In a situation like that such purchaser is protected from any fraud that the seller or vendor is perpetrating against a third party through the sale.

48. *Weston Gitonga's case* (*supra*) was then cited because of its reference to *Gatende's case* (*supra*) which set out the requirements for proof by a person claiming to be an innocent purchaser. I have already set out the requirements elsewhere in this judgement and I need not repeat them here.

49. It is important to appreciate the concept of innocent purchaser for value and the context in which it operates. In *Charles Karathe Kiarie & 2 others v Adminstators of the Estate of Jaohn Wallace Muthare (deceased) and 5 others* [2013] eKLR, the court stated that the Torrens System of Registration, which is where the concept of innocent purchaser traces its origin, is applicable in Kenya. The court acknowledged that under the system the title of innocent or bonafide purchaser for value without notice of fraud could not be impeached. More precisely, the court expressed itself thus:

> " The registration of Titles Act is entirely a product of Torrens Systems of registration. The word "Torrens" is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the Land Register which must mirror all currently registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interest shown on the register as against the entire world and incase of loss arising from error in registration the person affected is guaranteed of Government compensation. This presumption can only be rebutted by proof of fraud or misrepresentation which the buyer is involved."

50. Further, in *Peterson Kiengo & 2 others v Kariuki Thuo* [2012] eKLR, one sees the application of the concept of innocent purchaser when the court held that even though a fraudster had gotten himself registered as a proprietor of a parcel of land, the bonafide purchaser who bought the land from him acquired a good title that was indefeasible as he was not aware of the fraud.

51. The philosophy behind the Torrens System of registration of titles embodies three principles, namely, the mirror principle which suggests that the register perfectly reflects the exact state in which the title exists. Then there is the curtain principle which holds that a purchaser need not investigate the history of past dealings and need not get concerned about what is not recorded in the register. Finally, there is the insurance principle where the State guarantees the accuracy of the register and compensates any person who suffers as a result of the inaccuracy.

52. A qualified recognition of the principle of innocent purchaser seems to get statutory imprimatur under Section 80 of the *Land Registration Act*, 2012, which states as follows:

> " 80
>
> (1) Subject to Subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended it is satisfied that any registration was obtained, made, or omitted by fraud or mistake.
>
> (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration unless the proprietor had knowledge of the omission, fraud, or mistake in consequence of which the rectification is sought, or caused such omission, fraud

or mistake or substantially contributed by any act neglect or default." (emphasis: mine)

53. It can clearly be seen at the center of the application of the principle of innocent purchaser is a tortious or criminal mischief, often assuming the dimensions of fraud, perpetrated by a dishonest vendor of land against a third party in circumstances unknown or unknowable to the purchaser. Such a purchaser becomes protected by law. The third party affected by the sale transaction is deemed to be suitably placed to get compensation from the State.

54. It appears to me that the concept of innocent purchaser is not available for the benefit of the appellant in this case. And here is why: Central in the concept of innocent purchaser is the tort of fraud or misrepresentation. Essentially, what happens is that a dishonest person fraudulently acquires the land of another and then contrives or devises to dispose of that land, often through sale, to an unsuspecting person. Of course, the dishonest person or seller wouldn't want known the fraud surrounding his acquisition of land. The innocent buyer is protected by law particularly where it is shown that he exercised due diligence.

55. In the matter at hand, it is clear that the parties suits in the lower court were not based on fraud. Indeed, fraud did not even feature anywhere in the proceedings. Whether one is looking at the concept of bonafide purchaser through the definition given by the appellant or even the cases cited, fraud or fraudulent misrepresentation is a vital component. The fact that the cases in the lower court were not based on fraud is one reason why the concept of innocent purchaser cannot benefit the appellant.

56. But there is also another reason: The curtain principle associated with the concept of innocent purchase holds that the purchaser need not investigate beyond what is recorded or shown in the land register. Such a purchaser is not required to concern himself with the history surrounding past dealings in the land. Contrast this with the requirement of the law as found at the time in Section 93 (3) and (4) of *Land Registration Act* which placed a duty on the person to whom matrimonial property is to be transferred to inquire whether the person transferring has the consent of the spouse who is not part of the transaction. It is in fact important to note that even where such transferee makes an inquiry and is actually misled, the spouse whose interest is disregarded is at liberty to void the transaction, the innocence of the transferee in the whole transaction notwithstanding. This is the law that was applicable at the time. This direct intervention of statute law regarding matrimonial property seems to me to remove protection from any innocent transferee or purchaser. The doctrine of innocent purchaser could not therefore apply where consent relating to matrimonial property was not obtained.

57. By now, it is clear that to this court, the disputed land was matrimonial property at the time it was sold to the appellant. It is clear also that the doctrine or concept of innocent purchaser for value without notice of defect of title cannot, in the circumstances of this case, offer any protection to the appellant.

58. I now turn to the manner the lower court settled the dispute before it. It found that the disputed land was matrimonial property and being such, the 1st respondent enjoyed an overriding interest in the nature of spousal right over matrimonial property. That was the correct position at the time given the law applicable at the time the 1st respondent's suit was filed or at least when her cause of action arose. The lower court then decided that the interest enjoyed by both spouses could be divided or split equally. In this regard, the interest of the 4th respondent was half. The court then deemed that it is that half which the 4th respondent could legally sell to the appellant. That is what the appellant was awarded.

59. To me, the lower court was fair to the appellant. It appreciated that the 4th respondent at least had a half share which he could legally dispose of. I say so because there is Section 14 (a) of the *Matrimonial Property Act* which provides that where matrimonial property is in the name of one spouse, there is a

rebuttable presumption that the property is held in trust for the other spouse. That would essentially mean that the 4th respondent held the disputed land in trust for the 1st respondent. It is important to appreciate that the trust mentioned does not relate to half of the property. It relates to the whole property. The duty to make a successful rebuttal to the presumption of trust was primarily on the 4th respondent or the appellant herself to some extent. None of them mounted a successful or satisfactory rebuttal. If the lower court had chosen to be guided by this provision of law, the appellant would have lost everything.

60. But the lower court adopted a broader equity approach which treated the 4th and 1st respondents as tenants in common in terms of ownership. In this arrangement, each would be entitled to half share of the property. This is something that would find endorsement at the time under Section 93 (2) of the *Land Registration Act*. This approach by the lower court ensured that the appellant did not loose everything.

61. It is now clear that the merits of the appeal before this court have not been demonstrated. The lower court was fair to the appellant. She got something while she could as well have lost everything. The appeal before this court is therefore dismissed.

62. On the issue of costs, the court appreciates that costs follow the event. It is important to appreciate that costs are a matter of court's own discretion. In this matter, the record shows that the 4th respondent is now deceased. In my view, this is the party who should have shouldered the burden of costs. He was not very truthful to the appellant. He also seems to have nonchalantly ignored the interest of the 1st respondent. Although the appellant has lost the appeal, it is easy to appreciate that even with what the lower court awarded her, she still made a loss. The 4th respondent to whom she could have recourse to recover the loss is no more and no legal representative seems to have emerged. In the circumstances, my considered view is that each side should bear its cost both of the lower court suits and this appeal itself. It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 17TH DAY OF JULY, 2025.

In the presence of,

Appellant – present

1st Respondent present

Ms. Amihanda for 1st to 3rd respondents

Court Assistant – Musyoki

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI

17/7/2025